No. 75-1740

In the Supreme Court of the United States

OCTOBER TERM, 1976

HENRY SAMUEL ATKINS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 528 F. 2d 1352.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1976. A petition for rehearing was denied on April 21, 1976. The petition for a writ of certiorari was filed on May 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that local selective service board members based their denial of a requested hardship deferment in part upon personal knowledge of the financial situation of petitioner's family rendered his classification improper.

2. If so, whether an improper selective service classification bars conviction for wilfully failing to report for a pre-induction physical examination.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of failing to report for a pre-induction physical examination, in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' imprisonment; all but 90 days of the term was suspended, and he was placed on probation for one year. The court of appeals affirmed (Pet. App. 1a-10a).

In 1963, when petitioner registered with Selective Service Local Board 125 in Augusta, Georgia, he was an undergraduate college student (A. 51, 54).[1] Accordingly, he was given a II-S student deferment, a classification that was subsequently extended to allow petitioner to attend law school (A. 64). On July 24, 1969, following his graduation from law school, petitioner was reclassified I-A as available for military service and advised of his right to appeal this reclassification (A. 79).

Four days later, petitioner wrote his local board indicating that he felt he had been erroneously classified and that he deserved a III-A hardship deferment because he had a ten-month-old child and a pregnant wife, both of whom would face extreme hardship if he were inducted into the armed forces (A. 80). Thereafter, petitioner submitted affidavits and letters from his parents, his wife's parents, and from friends attesting to his entitlement to a hardship deferment (A. 81-90, 96-99).

[1]"A". refers to the appendix lodged by the government with the court of appeals.

The board advised petitioner that he would be considered for such a classification (A. 91).

On October 9, 1969, petitioner appeared before his local board in Augusta with respect to his claim for a III-A hardship deferment. Following his personal appearance, the local board unanimously voted to deny petitioner's claim for a hardship deferment and retain him in the I-A classification. Immediately subsequent to his appearance, the executive secretary of the local board prepared a two-page memorandum (A. 104-105) setting forth the matters considered by the members of the local board in making their determination (32 C.F.R. 1623.1(b) (1969)).[2] At the same time, the board notified petitioner of its action, whereupon he filed a notice of appeal on October 17, 1969 (A. 116-119).

In the meantime, on August 11, 1969, petitioner was ordered to report for a pre-induction physical examination (A. 100); the order was postponed based on his representation that he had moved (A. 101). The local board at Thomaston, Georgia, rescheduled petitioner's physical for October 21, 1969 (A. 128); petitioner then claimed

[2]The report stated, in part (A. 104-105):

> He claims extreme hardship. He has had a 2-S (not eligible for 3-A under Sec. 1622.30).
>
> He supported his wife while in college. He also has the Soldiers & Sailors Act for his indebtness [*sic*] of school expense.
>
> Wife & Children can receive allotment.
>
> The registrant has very well fixed families both he and his wife. The wife and children will not suffer a hardship.
>
> * * * *
>
> Board members have personal knowledge of the family circumstances and feel that since both families are well able to support family. Hardship deferment denied.

he had to return to Augusta under emergency conditions and did not appear (A. 130). Petitioner's physical examination was rescheduled for December 1, 1969 (A. 129). Again petitioner failed to appear, this time claiming that he had to be in Tallahassee, Florida, on that day to attend a mandatory course for persons newly admitted to the state bar (A. 131).

On February 12, 1970, the local board in Augusta received notification that the state appeal board had denied petitioner's request for reclassification, and it advised petitioner of the appeal board's action. Petitioner then requested the local board to reopen his classification based on a claim that his wife had been in a state of anxiety and emotional depression since the birth of their second child (A. 133). A week later petitioner was issued a fourth order to report for a pre-induction examination; he did not comply (A. 135). A fifth and final order was sent on April 8, 1970, directing petitioner to report for a physical examination on April 16, 1970 (A. 136-137). As before, petitioner failed to comply with the order.

Petitioner instead informed the local board that he had been advised to maintain his "status quo" and requested that further action be postponed until he could conclude consultations with his legal representatives (A. 140-141). Soon thereafter, petitioner wrote the board claiming entitlement to a III-A deferment and stating that he stood ready "to litigate this matter either as the plaintiff in a suit for an injunction or defendant in an action brought by the federal government" (A. 144). Petitioner was indicted on September 18, 1972; he chose not to avail himself of opportunities to avoid prosecution either by enlistment (A. 34) or under the President's clemency program (A. 39-40).

ARGUMENT

1. Petitioner claims that his I-A classification was invalid because the local board relied in part on its members' personal knowledge of his family's financial situation in denying his request for a hardship deferment.

The applicable administrative regulation (32 C.F.R. 1623.1(b) (1969)) permitted board members to draw on their personal knowledge in denying a request for classification, provided that "such information is reduced to writing and placed in the registrant's file." The board members accordingly properly stated in writing in petitioner's file that their personal knowledge of the financial condition of petitioner's parents and in-laws, as well as other recited factors, led them to the conclusion that his induction would result in no extreme hardship to his wife or children.

Moreover, there is no basis for petitioner's claim that had he been aware of the sources of the local board's personal knowledge "he could have responded to this adverse information by the time [his] file was sent to the appeal board" (Pet. 27). Prior to his appearance before the board, petitioner had submitted documentation in support of his hardship claim, including affidavits from both his parents and in-laws which generally stated their inability to provide financial support if petitioner were inducted (A. 81-83). At his appearance, the board reviewed "the file and all that was pertinent to the case" (Tr. 136). The issue of petitioner's parents' and in-laws' financial status was not merely pertinent, it was central to petitioner's case on his hardship claim, as indicated by petitioner's own affidavits (Pet. 5-6). Thus, it was evidently part

of the thorough exploration with petitioner at the hearing on his entitlement to the III-A classification.[3]

Finally, petitioner in effect conceded the correctness of the board's hardship evaluation by his subsequent conduct—in the summary of his personal appearance and supporting memorandum of law which petitioner filed soon after appearing before the board, petitioner did not argue that he was entitled to a hardship deferment, but only that he was "automatically entitled to a [III]-A deferment" since he was a father (A. 107-108). Thus, when given an opportunity to challenge the board's conclusion that no actual hardship would result from his induction, petitioner did not do so.[4]

2. Even assuming that petitioner was improperly classified, he is entitled to no relief.

Petitioner's contention is that had he been reclassified III-A as requested, he would not have been ordered to

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[3]We note that petitioner made no showing at his trial that he was denied an opportunity to respond to the "personal knowledge" of the board members. The only witness at trial was the board secretary, through whom the information in petitioner's selective service file was introduced into evidence. Petitioner neither testified nor did he call any board members to support the claim he now makes.

[4]Petitioner's reliance on *Gonzales* v. *United States*, 348 U.S. 407, and *McGarva* v. *United States*, 406 U.S. 953, is unfounded. Those cases dealt with the *ex parte* submission of a government agent's report to the appeals board during the pendency of the appeal, not with a claim that local board members improperly relied on their own knowledge of a registrant's circumstances.

Petitioner's reliance on *United States* v. *Taylor*, 490 F. 2d 442 (C.A. 5), is equally unavailing. In that case, the court found that reversal was required by the combination of unsupported information—that the registrant's wife was no longer sick—supplied to the appeal board and the denial of the registrant's right to a personal appearance, at which he might have refuted the information. Here, petitioner had a personal appearance, and the board fully explored his hardship claim.

report for a physical examination; he argues from this that if the board's denial of a hardship deferment was improper, so too were any orders—including the order to report for an examination—predicated on the denial of reclassification (Pet. 19-20).

This contention is effectively answered in the Court's decision in *McKart* v. *United States*, 395 U.S. 185. In that case McKart failed to report both for a pre-induction physical examination and for induction, but was charged only with failing to report for and submit to induction. This Court there held that McKart could raise the claim of improper classification as a defense to the offense charged even though he had not appealed his classification administratively. However, in so holding, the Court went on to recognize (*id.* at 201-203):

> [A] registrant is under a duty to comply with the order to report for a physical examination and may be criminally prosecuted for failure to comply. If the Government deems it important enough to the smooth functioning of the System to have unfit registrants weeded out at the earliest possible moment, it can enforce the duty to report for pre-induction examinations by criminal sanctions. In the present case, it has not chosen to do so. Petitioner has not been prosecuted for failure to report for his examination; he has been prosecuted for failure to report for induction * * *
>
> * * * * *
>
> [T]he Selective Service System has ample means to ensure that the great majority of registrants will report for their pre-induction examinations. * * * An invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction examination. [Footnotes omitted.]

The circuits have uniformly adopted this rationale. See, *e.g.*, *United States* v. *Rudd*, 487 F. 2d. 367 (C.A. 2); *United States* v. *Weislow*, 485 F. 2d 560 (C.A. 9), certiorari denied, 415 U.S. 933; *United States* v. *Shriver*, 473 F. 2d 436 (C.A. 3); *United States* v. *Dombrouski*, 445 F. 2d 1289, 1296-1297 (C.A. 8); see also *United States* v. *Irons*, 369 F. 2d 557 (C.A. 6), and cases cited at Pet. App. 6a. Petitioner presents no good reason for reviewing this established line of authority.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]The decisions in *Joseph* v. *United States*, 405 U.S. 1006, and *Lenhard* v. *United States*, 405 U.S. 1013, are of no avail to petitioner. Those cases involved summary reversals of convictions for failing to submit to induction upon the government's concession in this Court that reversible error occurred when a local board failed to state its reasons for denying an application for conscientious objector status where an applicant had made a *prima facie* showing of qualification for such a classification. See also *United States* v. *Stewart*, 478 F. 2d 106, 110-113 (C.A. 2). These cases do not suggest, as petitioner claims, that despite the express language in *McKart* any improper classification serves as a defense to a charge of refusing to report for a physical examination.

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